

## **EXHIBIT A**

## ***CERTIFIED COPY***

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable PHYLLIS J. HAMILTON, Judge

RYAN COFFEY, individually ) **Plaintiff's Motion to**  
and on behalf of all others ) **Remand**  
similarly situated, )  
 )  
 Plaintiff, )  
 )  
 vs. ) NO. C 18-03286 PJH  
 )  
 RIPPLE LABS INC., et al., ) Pages 1 - 29  
 )  
 Defendants. ) Oakland, California  
 ) Wednesday, August 1, 2018

---

## REPORTER'S TRANSCRIPT OF PROCEEDINGS

## APPEARANCES:

For Plaintiff: Taylor-Copeland Law  
501 W. Broadway, Suite 800  
San Diego, California 92101  
BY: JAMES Q. TAYLOR-COPELAND,  
ATTORNEY AT LAW

For Defendants: Skadden, Arps, Slate  
Meagher & Flom, LLP  
300 South Grand Avenue, Suite 3400  
Los Angeles, California 90071  
BY: PETER B. MORRISON, ATTORNEY AT LAW

Reported By: Raynee H. Mercado, CSR No. 8258

Proceedings reported by electronic/mechanical stenography; transcript produced by computer-aided transcription.

**RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR (510) 451-7530**

1 || Wednesday, August 1, 2018

9:03 a.m.

## PROCEDINGS

5 Counsel, please step forward and state your appearances.

6 MR. TAYLOR-COPELAND: Good morning, Your Honor.

7 James Taylor-Copeland on behalf of plaintiff Ryan Coffey.

THE COURT: All right. Good morning.

2 MR. MORRISON: Morning.

13                   **THE COURT:** All right. This matter is on for  
14 plaintiff's motion to remand the matter.

5 Where are you going?

6 Bring your papers --

7 MR. MORRISON: Just grab my papers, Your Honor.

THE COURT: Okay.

19       Okay. So this is on for hearing on plaintiff's motion to  
20 remand. Did you wish to make a presentation this morning,  
21 Mr. Copeland?

22 MR. TAYLOR-COPELAND: Yes, Your Honor.

24 Let me just tell you what the difficulty I'm having with  
25 the case is.

1                   **MR. TAYLOR-COPELAND:** Sure.

2                   **THE COURT:** All right. You've got both state claims  
3 and federal claims. **There doesn't appear to be any dispute**  
4 **between you that if your lawsuit had alleged solely claims**  
5 **arising out of the Securities Act, it wouldn't be removable**  
6 **because the anti-removal bar.**

7                   If your case had alleged claims arising under state  
8 court -- under state law, they would be removable. So the  
9 question is does the combination of the two -- I mean, I  
10 frankly don't know why you even put in the state claims if you  
11 wanted to stay in state court because it's absolutely clear,  
12 as far as I can see, there is no case, not even *Luther* that  
13 addresses the exact situation we have here where there are  
14 what otherwise would be removable state claims.

15                   **MR. TAYLOR-COPELAND:** Sure, Your Honor.

16                   **THE COURT:** All right. So that's the dilemma.

17                   **MR. TAYLOR-COPELAND:** And I understand that. And the  
18 reason we included state law claims is because California has  
19 a different test for what constitutes a security than the  
20 federal. How we test some things that would be securities  
21 under federal law would not be securities in California and  
22 vice versa.

23                   And I think -- I'm in complete agreement with you. The  
24 sole question before the court today, given *Luther's* decision,  
25 that the Securities Act's removal bar trumps CAFA is whether

1 the Securities Acts removal bar --

2 **THE COURT:** But *Luther* didn't involve state claims.

3 **MR. TAYLOR-COPELAND:** That's correct.

4 **THE COURT:** So it's not entirely clear that that  
5 reasoning would apply to this case.

6 **MR. TAYLOR-COPELAND:** Well, I think the only question  
7 before the court is whether the Securities Acts removal bar  
8 precludes removal of cases that join Securities Act claims and  
9 state law claims. And I think the answer to that is supplied  
10 by the language in the removal bar itself, which states that  
11 no case arising under the subchapter shall be removed.

12 And if the court needs to look past the plain language of  
13 the Securities Act, the limited exception to the Act provides  
14 additional evidence that the bar precludes removal of entire  
15 cases and not just individual claims.

16 **THE COURT:** You're talking about 16(d)?

17 **MR. TAYLOR-COPELAND:** No, I'm talking --

18 **THE COURT:** 16(c)?

19 **MR. TAYLOR-COPELAND:** So in SLUSA, as -- as the  
20 court -- the Supreme Court noted *Cyan*, Congress added in this  
21 "except as provided in Section 77p(c)," exception to the  
22 removal bar.

23 So now the removal bar states, "Except as provided in  
24 Section 77p(c) of this title, no case arising under the  
25 subchapter shall be removed."

1 Section 77p(c) in turn --

2 **THE COURT:** That's 16(c), right? That's what I've  
3 been referring to as "16(c)."

4 **MR. TAYLOR-COPELAND:** It may be -- yes. It may be  
5 securities --

6 (Simultaneous colloquy.)

7 **THE COURT:** I think it is.

8 **MR. TAYLOR-COPELAND:** -- 16(c) of the Securities Act.

9 **THE COURT:** Okay.

10 **MR. TAYLOR-COPELAND:** And then that in turn refers to  
11 section 77(b), which would be 16(b), which identifies the  
12 covered class actions that may be removed.

13 And now if, as defendants contend, the Securities Act  
14 barred only removal of individual claims, there would have  
15 been no reason to include this "except" language in -- in  
16 amending the removal bar because those claims would have been  
17 removable anyway under section 77p(c) or 16(c), which says  
18 that the claims identified in section 16(b) are removable.

19 And I think what this further evidences is that when  
20 Congress intends for cases arising out of the Securities Act  
21 to be removable, it says so explicitly.

22 You know, there would have been a conflict between Section  
23 77 -- 77p(c) or 16(c), and the removal bar, but Congress  
24 explicitly identified that and allowed for removal because it  
25 wanted to allow removal in that case.

1                   **THE COURT:**    Hmm.

2                   Okay.

3                   All right. You state that position in your papers.

4                   Anything else?

5                   **MR. TAYLOR-COPELAND:** Well, I think that, you know,  
6                   the -- the defendant's analogy to general diversity further  
7                   reinforces this idea that where Congress wants to allow  
8                   removal in the face of an anti-removal statute. It does so  
9                   explicitly.

10                  They identify Section 1441(c), which until 1990 addressed  
11                  where federal courts could exercise jurisdiction where they  
12                  had diversity mixed with a non-removable claim. And that  
13                  subject chapter stated that removal was only proper where the  
14                  non-removable claim was separate and independent from the  
15                  Securities Act claim.

16                  You know, once again, this shows that Congress understands  
17                  the potential for conflict between diversity jurisdiction and  
18                  its non-removal -- non-removal statutes and that where it  
19                  intends to allow removal, it does so explicitly.

20                  **THE COURT:**    Hmm.    Okay.

21                  All right. Response?

22                  **MR. MORRISON:**    Thank you, Your Honor.

23                  Let me start here. Your honor's exactly correct.

24                  *Luther --*

25                  **THE COURT:**    Well, I haven't made any --

1 (Simultaneous colloquy.)

2 **MR. MORRISON:** *Luther's* -- you're exactly correct,  
3 that *Luther* does not cover the situation.

4 **THE COURT:** Right.

5 **MR. MORRISON:** What plaintiff is asking for is an  
6 **expansion of *Luther*** that is unwarranted and not found anywhere  
7 in the law.

8 Given that *Luther* doesn't answer the question, simple  
9 statutory construction does answer the question. And I'd like  
10 to take a minute to walk the court through simple statutory  
11 construction about why the right answer is for this entire  
12 case to stay in federal court.

13 In order to analyze an issue that's an open question, you  
14 have to start, Your Honor, with the removal statutes  
15 themselves. That's the basis for removal jurisdiction.

16 The statute on which we are relying is CAFA removal, 1453.  
17 There's no debate that everything in this case satisfies all  
18 of the requirements of 1453. There's over a hundred class  
19 members, not disputed. Over \$5 million in dispute, not  
20 disputed. Minimal diversity, not disputed. No exception  
21 applies, not disputed. We satisfy CAFA removal under 1453,  
22 period, full stop.

23 Now the question is in cases involving both a federal '33  
24 Act claim and a state law claim, does the removal bar in 22(a)  
25 serve to bar removal of all of it, not just the '33 Act claim.

1 The answer to that question, Your Honor, is when you compare  
2 what Congress did in 1453 with what Congress did in the  
3 general removal statute in 1441(a). 1441(a) contains a clause  
4 which is extraordinarily significant.

5 **THE COURT:** Right.

6 **MR. MORRISON:** That -- that statute, the general  
7 removal statute says, "except as otherwise provided by an act  
8 of Congress." Okay?

9 Court after court interprets that language to refer to  
10 removal bars. The point of that language is you can remove  
11 except as otherwise provided by Congress. And what does that  
12 mean? It means if Congress over here, like in 22(a), said you  
13 can't remove, the general removal statute in 1441(a) is going  
14 to defer to the removal bar. That's the language.

15 And, in fact, plaintiff's own case in *Nexbank* -- this is a  
16 case that he cites in his reply at seven -- says exactly that.  
17 It says the prohibition of removal under the '33 Act is an  
18 exception otherwise provided by law that is contemplated by  
19 the general removal statute under 1441(a).

20 So there's no question that "except as otherwise provided  
21 by Congress," even based on the case law he cites, refers to  
22 removal bars.

23 Now look at 1453. That language "except as otherwise  
24 provided by Congress" -- that would otherwise refer deference  
25 to removal bars is nowhere to be found 1453. By definition,

1 Your Honor, that means that the removal bar doesn't apply to  
2 CAFA removal by simple statutory construction.

3 We cite in our papers, Your Honor, no fewer than 12  
4 cases --

5 **THE COURT:** And in addition, 1453 has its own  
6 specified exceptions.

7 **MR. MORRISON:** Correct. And I'm going to get that.

8 So not only do we cite 12 cases that support this  
9 proposition, including two U.S. Supreme Court cases, Your  
10 Honor. And just briefly for the record, the *Providence* case  
11 says -- it observes, "when two statutes included," quote,  
12 "'except as otherwise authored by law' language, but that,"  
13 quote, "by way of vivid contrast," end quote, "the third did  
14 not. The third statute provided for no exception." That's  
15 exactly this case.

16 The *Russello* case, United States Supreme Court, Your  
17 Honor, and it's a quote from the case, where Congress includes  
18 particular language in one section of a statute but omits it  
19 in another section of the same act, it is generally presumed  
20 that Congress acts intentionally and purposefully in the  
21 disparate inclusion or exclusion of the language.

22 So there's no question that Congress's choice to include  
23 the "except as otherwise provided by act of Congress" language  
24 in 1441(a) meant deference to removal bars.

25 By not including in it 1453, there's no deference to

1 removal bars, which means if we satisfy 1453, we stay in  
2 federal court.

3 Want to make one more point on that, Your Honor. And then  
4 if it's okay, I'd like to respond to a few arguments --

5 **THE COURT:** There's plenty of time.

6 **MR. MORRISON:** Thank you.

7 **THE COURT:** You don't have to rush.

8 **MR. MORRISON:** Thank you.

9 Let me make one other point on my -- the statutory  
10 construction argument.

11 Remember what CAFA did. CAFA did two things. The first  
12 thing it did was it expanded diversity jurisdiction, original  
13 diversity jurisdiction under 1332. It added subsection D.  
14 Okay?

15 If Congress intended for removal bars to apply to the  
16 expanded diversity jurisdiction, all it had to do was say,  
17 we're going to amend 1332(d), and expand diversity  
18 jurisdiction but we're going to leave removal jurisdiction  
19 exactly the way it is. And then if you want to remove, you  
20 can remove under 1441(a), the general removal statute. The  
21 "except as otherwise Congress" language would apply and fit  
22 within the expanded diversity jurisdiction, great. But if  
23 there's a removal bar, you're out of luck.

24 But that's not what they did. Not only did they expand  
25 original diversity jurisdiction. They then added an entirely

1 new statute for CAFA removal jurisdiction.

2 The only reason to add an additional statute under 1453  
3 without the "except as otherwise provided" language would be  
4 to expand federal removal jurisdiction. Otherwise 1453 would  
5 be completely superfluous. You wouldn't need it.

6 Beyond that, and the point that Your Honor made is,  
7 Congress was express about the exceptions to CAFA removal.  
8 There's three of them. None of those three show any deference  
9 to removal bars.

10 So if *Luther* doesn't answer the question, in order to  
11 analyze the issue, you just go to simple statutory  
12 construction. There is no reading of this that would permit  
13 the removal bar to apply in this instance to a CAFA removal.

14 Otherwise the "except as otherwise provided by an act of  
15 Congress" language would be completely meaningless.

16 **THE COURT:** Now, of course, *Luther*, was a CAFA  
17 removal, wasn't it?

18 **MR. MORRISON:** It was. *Luther* was a CAFA removal,  
19 yes.

20 Well, let me address -- let me turn to addressing some of  
21 the remarks, and I will cover the *Luther* case, Your Honor.

22 So it sounds like we're in agreement that *Luther* dealt  
23 with a '33 Act claim and not '33 Act and state law claims.

24 **THE COURT:** And in fact, in the opinion, it says  
25 explicitly on several occasions "this case involves solely

1 Securities Act claims."

2 **MR. MORRISON:** In fact, I have the quote here. It  
3 says, Section 22(a), the removal bar more precisely applies  
4 only to claims under the '33 Act." So on its own terms, it  
5 doesn't apply to state law claims.

6 But I'll give you another rationale for why *Luther* can't  
7 be expanded here. The basis of *Luther*, Your Honor, was that  
8 the Securities Act is more narrow and precise than CAFA.

9 Now, reading between the lines, what *Luther* is saying, the  
10 '33 Act applies to securities cases, and CAFA applies across  
11 the board.

12 The expansion of *Luther* that plaintiff seeks here would be  
13 to apply the removal bar based on CAFA, to not just '33 Act  
14 claims but any other claim brought along with a '33 Act claim.

15 If that were the case, Your Honor, it would completely  
16 undermine the rationale of *Luther* because under that theory, I  
17 could bring a '33 Act claim, and I could bring 99 other state  
18 law claim (sic) that other would be removable, and then none  
19 of them would be removable based on *Luther*.

20 If that were the case, the removal bar wouldn't be more  
21 narrow than CAFA, it would be way more broad. And so this  
22 idea that the removal bar is more narrow and CAFA is more  
23 broad would be completely out the window. So the expansion of  
24 *Luther* that he seeks is not only contrary to the express  
25 language of *Luther*; it would completely undermine the

1 rationale underpinning *Luther*.

2 And, look, Your Honor, given post-*Luther* developments, far  
3 from an expansion of *Luther*, there are good arguments that  
4 *Luther* should be limited at a minimum, has been abrogated, or  
5 should be overturned.

6 *Dark Cherokee* came out after *Luther*. The *Katz* decision in  
7 the Seventh Circuit completely undermines the rationale in  
8 *Luther*. And an expansion of *Luther* in the way that plaintiff  
9 asks the court to expand it would completely undermine *Luther*.

10 Now, let me address couple other points.

11 **THE COURT:** Of course, this authority -- **this court**  
12 **has no authority to overturn *Luther*.** You're simply asking the  
13 court not to expand --

14 **MR. MORRISON:** Correct, Your Honor.

15 We believe that there is a **good argument that *Luther's***  
16 **been abrogated by *Dark Cherokee*** and that in instance, the  
17 court need not follow it as precedent, which I'm happy to  
18 discuss and we've laid in our papers.

19 But yes, **this court doesn't have the ability to overturn**  
20 **it.**

21 **THE COURT:** The -- My question is whether or not  
22 *Luther* even applies in this situation.

23 **MR. MORRISON:** We don't think that it does, Your  
24 Honor.

25 **THE COURT:** Because of the hybrid nature --

1                   **MR. MORRISON:** And --

2                   **THE COURT:** -- or the mixed nature of --

3                   **MR. MORRISON:** And because of the statutory  
4 construction argument that I laid out for the court. That  
5 statutory construction argument, Your Honor, isn't found  
6 anywhere in *Luther*, and *Luther* doesn't address the hybrid  
7 situation.

8                   And as I said, absent controlling precedent on this issue,  
9 you have to go to the source, which are the statutes.

10                  And the only way to read 1453 and 1441(a) together would  
11 be to apply removal bars to the general removal state but not  
12 apply removal bars to 1454 under CAFA.

13                  Otherwise, the "except as otherwise provided by Congress"  
14 language is superfluous, which isn't allowed.

15                  Let me address, Your Honor, plaintiff's argument about the  
16 language of the removal bar itself. If I can get to my notes.

17                  Counsel said that one way to look at this case, Your  
18 Honor, would be to look at the language of the removal bar and  
19 that the removal bar says "no case arising under this chapter  
20 shall be removed" and, therefore, it applies across the board.

21                  Well, it's "case arising under this chapter," not just  
22 "case," to begin with. But he doesn't cite a single case that  
23 interprets the word "case" in the removal bar in that manner.

24                  And in fact, we cite a case, the *Emrich vs. Touche Ross*  
25 decision, which is a Ninth Circuit decision, that puts that

1 argument to bed. Right?

2 So just to lay it out, what he argued, Your Honor was  
3 because the removal bar says "case," by definition, it applies  
4 to "the case" so long as it includes a '33 Act claim and no  
5 matter whatever else it includes. Not only would that  
6 rational undermine *Luther*, but there's -- no case says that.

7 And, in fact, the Ninth Circuit has already found  
8 differently. In the -- in the *Emrich* versus Touche Ross case,  
9 Ninth Circuit 1988, plaintiff asserted a RICO claim, state law  
10 claims, and a '33 Act claim. And the Ninth Circuit looked at  
11 each case individual -- individually.

12 The Ninth Circuit did not say, Well, there's a '33 Act  
13 claim; therefore, none of these claims are removable.  
14 Actually what happened was it kept the RICO and state law  
15 claims in federal court but remanded the '33 Act claim.

16 Now, I'm not arguing for you to sever the claims here,  
17 Your Honor. There's no ability to sever the claims because  
18 the removal statutes in existence at the time of *Emrich*  
19 permitted that type of severance. Here, those statutes are no  
20 longer on the books, and CAFA didn't exist at the time.

21 But what did exist at the time of the *Emrich* case was the  
22 removal bar in 22(a). And interpreting the removal bar in  
23 22(a) and the word "case" in the removal bar of 22(a), the  
24 Ninth Circuit, controlling authority, Your Honor, looked at  
25 each individual claim and didn't just say, "if you have a '33

1       Act claim, then not a single claim in this case is removable."  
2       So that argument -- that statutory language argument he makes  
3       has been rejected by the Ninth Circuit.

4           And I need to just make a quick point on the *Emrich* case,  
5       Your Honor, because unfortunately plaintiff miscites it in his  
6       reply brief. And so I need to make a record of this. Because  
7       we don't have a chance to respond to the reply.

8           In his reply brief when discussing *Emrich*, the brief says,  
9       and I'm quoting, "in fact, examination of defendants own  
10       authority reveals that federal courts have consistently  
11       remanded cases containing Securities Act claims and related  
12       claims that would otherwise be removable, and then he cites  
13       *Emrich*. *Emrich* doesn't say that at all. *Emrich* keeps the  
14       RICO case in federal court, keeps the state law claims in  
15       federal court. So that citation is not correct.

16           And then he doubles down on that, Your Honor, again, on  
17       page 6, with a parenthetical to *Emrich* that says "remanding  
18       case containing RICO claim and Securities Act claims," that  
19       it's just not accurate and so I want to make sure the court's  
20       aware of it.

21           Last and final -- well, there's a couple little things I  
22       can respond to. But his third major argument -- so his first  
23       argument is *Luther*.

24           **THE COURT:** Are you taking the position that there  
25       isn't indeed any authority for the remand -- for the remand in

1 a situation such as this where it's a mixed case?

2 **MR. MORRISON:** I am not aware of a case that remands  
3 in this situation Your Honor. Have I read the entire F.Supp?  
4 I can't say that I have so I don't want to make a  
5 representation that there is no case. I'm not aware of one.

6 **THE COURT:** And none was cited --

7 **MR. MORRISON:** And none were cited --

8 (Simultaneous colloquy.)

9 **MR. MORRISON:** -- Your Honor, I can tell you this.  
10 We scoured the law to see if there's a case, and we couldn't  
11 find one. And --

12 **MR. TAYLOR-COPELAND:** Your Honor, there also are no  
13 cases --

14 **THE COURT:** Hold on. You'll get plenty of time to  
15 respond.

16 Okay. It's his turn --

17 **MR. MORRISON:** Thank you, Your Honor. If I may just  
18 grab a little more water.

19 There are cases, however, that go the other way. And we  
20 cite them in our -- in our papers, so I can give you a few  
21 examples if that's helpful.

22 **THE COURT:** If they're in your papers, I don't need  
23 you to --

24 **MR. MORRISON:** Okay. Sure.

25 Let me address now the argument that counsel made.

1       Counsel said CAFA removal is not available because only SLUSA  
2       removal is available. And there was a discussion about 16(c)  
3       and had Congress wanted to permit removal, they would have  
4       amended the removal bar differently.

5           And there's a entire section in both the -- his moving  
6       brief and his reply brief that one of the reasons why CAFA  
7       removal is not available is because when you have a securities  
8       case at play -- a Securities Act claim at play, the only  
9       avenue to removal is through the removal bar carve-out in  
10      SLUSA and you cannot go the CAFA route. That's wrong as a  
11      matter of law.

12           So the discussion that counsel just had with the court --

13           **THE COURT:** Well --

14           **MR. MORRISON:** -- about SLUSA removal is  
15      inapplicable.

16           **THE COURT:** An anti-removal bar that applies to one  
17      removal statute wouldn't necessarily apply to all removal bar  
18      removal statutes.

19           **MR. MORRISON:** That's my point, Your Honor. And  
20      if -- if that's clear, then I don't need to address it.  
21      That's -- he -- plaintiff's counsel in his papers believes  
22      that because you have a removal bar in the '33 Act, unless you  
23      can find a path up through the removal bar on the SLUSA side  
24      of things, you can't remove the case, and you have to ignore  
25      CAFA and 1453. That's just not accurate. There's not a

1 single case that stands for that proposition.

2 **THE COURT:** Well, there are multiple ways to remove a  
3 case --

4 **MR. MORRISON:** Correct.

5 (Simultaneous colloquy.)

6 **THE COURT:** -- that permit it, and you don't have to  
7 meet all of them in order to remove a case.

8 **MR. MORRISON:** Correct.

9 **THE COURT:** You just have to meet one of them.

10 **MR. MORRISON:** That's right.

11 Okay. Fair enough. So I will -- I'll move on from there.

12 Now, I think with that, unless the court has questions --

13 **THE COURT:** Well, just about the -- the federal  
14 claims.

15 **MR. MORRISON:** Yes, Your Honor.

16 **THE COURT:** What's your position with regard to  
17 the -- I'm having some difficulty understanding exactly -- you  
18 agree that the state claims are removable under CAFA.

19 **MR. MORRISON:** Correct.

20 **THE COURT:** Correct?

21 **MR. MORRISON:** Yes.

22 **THE COURT:** And is your argument that the federal  
23 claims are removal (sic) because under original jurisdiction,  
24 if one claim is removable, the whole case is removable? Or  
25 are you taking the position that supplement jurisdiction

1 applies? What? What?

2 **MR. MORRISON:** No. The position is all of the claims  
3 are recommendable under CAFA, the '33 Act claim and the state  
4 law claims. The removal bar doesn't apply in the CAFA context  
5 where you have both removable and non-removable claims because  
6 of the statutory construction argument I made.

7 **THE COURT:** Um-hmm. Okay.

8 **MR. MORRISON:** Now -- and I'll -- let me say -- let  
9 me add this, Your Honor. This case is far better than some of  
10 the other Supreme Court cases that have dealt with similar  
11 situations. So there was a big debate in the law about what  
12 "supplemental jurisdiction" meant for a while, and there  
13 were -- there are a number of cases, and we cite them, where  
14 you had clearly removable claims and then you had other claims  
15 at play that were not removable at all because, say, they  
16 didn't meet the monetary threshold for diversity removal, or  
17 because there was not complete diversity.

18 I'm thinking of a situation where you could have a federal  
19 claim under the '34 Act and a derivative claim, state law,  
20 that wouldn't otherwise be removable. And the question was if  
21 one is removable and one is not, what do you do?

22 And Congress passed the supplemental jurisdiction statute  
23 to say you have to keep cases together. In that instance,  
24 Your Honor, you had one case that clearly had original -- one  
25 claim, clear original jurisdiction, and another claim with no

1 jurisdiction.

2       Here, this case is far better. There's no question that  
3 the state law claims have jurisdiction. And the federal  
4 claims have federal question jurisdiction. Or supplemental  
5 jurisdiction, and they certainly have CAFA jurisdiction.

6       So if Congress went out of its way to ensure supplemental  
7 jurisdiction over claims that doesn't have any business being  
8 in federal court, certainly the '33 Act claims with multiple  
9 avenues to get to -- get to federal court should be kept with  
10 the clearly independently removable state law claims,  
11 particularly because the only way to give effect to that  
12 "except as otherwise provided by act of Congress" language in  
13 1441(a) Would be not to apply the removal bar where that  
14 language does not exist in 1453.

15       **THE COURT:** Okay.

16       **MR. MORRISON:** Thank you, Your Honor.

17       **THE COURT:** All right. Response?

18       **MR. TAYLOR-COPELAND:** Yes, Your Honor.

19       The statutory construction argument that the defendants  
20 just made is exactly the argument that the Ninth Circuit  
21 rejected in *Luther*. It was the argument that was raised in  
22 the district court and then again on appeal and rejected by  
23 the Ninth Circuit.

24       And then going on to the -- the wording of *Luther*,  
25 defendants have cherry-picked certain instances in which

1       *Luther* refers to claims, but there's also a number of  
2 instances in which the *Luther* case refers to the Securities  
3 Act precluding removal of entire cases.

4       In fact, *Luther* states, Section 22(a), quote, strictly  
5 forbids removal of cases brought in state court and asserting  
6 claims under the Act.

7       Plaintiff's position is that CAFA doesn't allow removal of  
8 individual claims. By its own wording, CAFA allows removal of  
9 other entire class actions or not. And the Ninth Circuit  
10 recognized that there's a conflict between CAFA and the  
11 Securities Acts removal bar. And the Ninth Circuit determined  
12 that the Securities Acts removal bar trumps CAFA, and despite  
13 what defendants are saying --

14       **THE COURT:** Do you --

15       **MR. TAYLOR-COPELAND:** -- decision is controlling.

16       **THE COURT:** Do you think that it makes a difference,  
17 though, that the *Luther* cases didn't include state claims as  
18 your case does?

19       **MR. TAYLOR-COPELAND:** I don't think it does.

20       **THE COURT:** Why not?

21       **MR. TAYLOR-COPELAND:** I think -- well, because the  
22 Securities Act removal bar precludes removal of cases.

23       **THE COURT:** Any case that has a Securities Act claim,  
24 even if there are a hundred state claims?

25       **MR. TAYLOR-COPELAND:** Well, Your Honor, I think, one,

1       this isn't a case in which there are a hundred state claims.  
2       This is a case in which there are state securities claims that  
3       are closely tied to the Securities Act claim.

4           There's no allegation in this case that the Securities Act  
5       claim was somehow brought just as a way to -- to use the  
6       removal bar. So -- but yes, I would say that it does,  
7       especially when those state law claims are related to the  
8       Securities Act claim.

9           And, in fact, the state securities claims can in some way  
10      be said to arise directly out of the Securities Act itself.  
11      California's Corporation Code was enacted following up on the  
12      Securities Act. And particularly its registration provisions  
13      borrow heavily from the Securities Act.

14           **THE COURT:** Um-hmm. Okay.

15           **MR. TAYLOR-COPELAND:** And then if -- if we could  
16      circle back to this *Emrich v. Touche* case in the Ninth  
17      Circuit, defendants are somehow suggesting that the court  
18      there decided that the case language doesn't mean entire  
19      cases.

20           What they're neglecting to inform the court is that the  
21      court there was dealing with a statute which went through when  
22      individual claims were removable when paired with other  
23      individual claims.

24           So this is, I think, 1441(a) after 1441(c) was -- was  
25      changed. But you -- that sort of is the language where cases

were allowed to be removed only when they were separate and independent from the non-removable claim.

And, you know, if -- if defendants want to perform an analysis of whether this case is separate and -- the state law claims are separate and independent, I think certainly they're not in this case. They -- they all arise out of the same wrong, and that's defendant's sale of unregistered XRP securities.

**THE COURT:** Um-hmm. Okay.

(Pause in the proceedings.)

**MR. TAYLOR-COPELAND:** That's all I have, Your Honor.

**THE COURT:** Okay.

**MR. MORRISON:** May I make one quick point, Your Honor?

THE COURT: Sure.

**MR. MORRISON:** I'll be brief.

**THE COURT:** There's no rush.

**MR. MORRISON:** Okay. Thank you, Yo

Let's say that this is a close case, and the court is struggling with exactly what to do here. There --

THE COURT: It is and it is

MR. MORRISON: Sounds it.

And so I wanted to try to be helpful. There are tie-breakers in the law in this context, Your Honor. *Dark Cherokee* and the Supreme Court has said that when you apply

1 CAFA, you apply it broadly and that there is no presumption  
2 against removal.

3 If anything, there is a presumption in favor of removal  
4 because the entire policy behind CAFA is to have large,  
5 important, nationwide class actions stay in federal court.

6 That's exactly what this is, Your Honor. It's over --  
7 allegedly over \$300 million at issue. It's a nationwide class  
8 action and is an issue of first impression about --

9 **THE COURT:** Actually, it could be an international  
10 class action.

11 **MR. MORRISON:** That's correct. And it's -- it's --  
12 issue of first impression about how virtual currency should be  
13 regulated. That's number one.

14 So CAFA alone and the Supreme Court tells the court how to  
15 break ties. That's number one.

16 Number two is burden. Once we show that we've satisfied  
17 removal jurisdiction under CAFA -- and *Luther* says this --  
18 we've borne our burden to be in federal court. We've done  
19 that. There's no question we satisfy the requirements of  
20 CAFA. Once we do that, plaintiff bears the burden to show  
21 that an exception or the removal bar applies.

22 So given that all ties under CAFA get broken in favor of  
23 federal court and given that he bears the burden of showing  
24 why that shouldn't be the case, if it's a close case in Your  
25 Honor's mind, you have to keep this case in federal court,

1 Your Honor.

2 Thank you.

3 **MR. TAYLOR-COPELAND:** Could I briefly respond to  
4 that?

5 **THE COURT:** Sure.

6 **MR. TAYLOR-COPELAND:** Yeah, the -- the purpose of  
7 CAFA was to keep certain high-dollar class actions in federal  
8 court. But the purpose of the Securities Acts removal bar is  
9 to give plaintiffs their choice of forum and venue in  
10 securities cases.

11 Removal bars are very rare. Congress included that  
12 removal bar in the Securities Act in 1933. Congress amended  
13 the Securities Act with a view towards securities class  
14 actions in 1995 and 1999. And it even carved out certain  
15 language about when securities class actions could be removed  
16 to federal court.

17 None of those amendments allowed for removal of securities  
18 cases. So our position is that the Securities Acts removal  
19 bar, and this is what the Ninth Circuit says in *Luther*, is the  
20 more specific and focused statute.

21 Viewed in the context of the PSLRA and SLUSA amendments,  
22 it focuses specifically only when removal of Securities Act or  
23 securities class actions is permissible.

24 And then to address the argument regarding *Dark Cherokee*,  
25 the *Dark Cherokee* court considered the single question, and

1 that was to assert the amount in controversy adequately pled  
2 in the removal notice, does it suffice to allege the requisite  
3 amount plausibly or must the defendant incorporate into the  
4 notice of removal evidence supporting the allegation?

5 The Supreme Court decided that that answer was supplied by  
6 the statute itself, and then notes in passing that no  
7 presumption against removal attaches to CAFA.

8 The Supreme Court wasn't addressing a situation like this,  
9 like the one addressed by *Luther* where a (sic) anti-removal  
10 statute conflicts with CAFA and diversity jurisdiction.

11 **THE COURT:** Okay.

12 **MR. TAYLOR-COPELAND:** So --

13 **THE COURT:** Are you taking the position that even if  
14 the state claims were dismissed, that the case would still be  
15 removable?

16 **MR. MORRISON:** Yes, Your Honor, because courts  
17 adjudicate removal under the law as the complaint exists at  
18 the time of removal. So even if we were to stay in federal  
19 court and the state claims would be dismissed because of the  
20 time of removal they were there, it stays in federal court.

21 **THE COURT:** Okay. But otherwise, you would agree  
22 that the anti-removal bar would apply --

23 **MR. MORRISON:** If --

24 **THE COURT:** -- if they had been dismissed in state  
25 court.

**MR. MORRISON:** If -- Take a hypothetical where counsel only had brought '33 Act claims, then you would be in a situation where *Luther* may be more applicable here. We believe, Your Honor, that there is a good argument for removal even if that situation given *Dark Cherokee*, given *Katz* --

**THE COURT:** Sure. But that's not --

(Simultaneous colloquy.)

**THE COURT:** That's not a strong --

(Simultaneous colloquy.)

**THE COURT:** -- a strong argument.

**MR. MORRISON:** I think the existence of the state law claims make this very different from *Luther*, but I don't want to say to you that we wouldn't remove even if this were different because we think that should the Ninth Circuit get a chance, they're going to revisit *Luther* and come out differently.

**THE COURT:** Okay. All right. Well, it wouldn't present a dilemma for me. I would -- I'd remand it, obviously. Yeah.

But in any event, I think this is a difficult question, and I think it's sort of a complicated question. And if I were to deny the motion to remand and keep the case here, I would be inclined to certify the question to the Ninth Circuit on the remand because I'd hate to adjudicate a case that is likely to be as complicated as this case could be if, in fact,

1 it really does belong in state court.

2 What do you think about that?

3 Is that a question you would -- if you were to lose your  
4 motion today, is that something that you would like to pursue,  
5 an interlocutory appeal, if the Ninth Circuit were willing to  
6 hear it.

7 **MR. TAYLOR-COPELAND:** It's certainly something that  
8 we would consider if we lost this motion today, yes.

9 **THE COURT:** Okay.

10 All right. Well, I'm still thinking about it.

11 Anything else?

12 **MR. MORRISON:** Not from me, Your Honor.

13 **MR. TAYLOR-COPELAND:** No.

14 **THE COURT:** All right. Matter stands submitted.

15 Thank you.

16 **MR. TAYLOR-COPELAND:** Thank you.

17 **MR. MORRISON:** Thank you very much, Your Honor.

18 (Proceedings were concluded at 9:39 A.M.)

19 --00--

20

21

22

23

24

25

## **CERTIFICATE OF REPORTER**

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Rayne F. Merado

Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Sunday, August 12, 2018

**RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR (510) 451-7530**